314 U.S. 63

(10)

Office - Supreme Court, U. S.
FILED
JUN 5 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

No. 127

J. H. HEMLER,

Petitioner,

versus

HOPE PRODUCING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, 5TH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

J. H. Hemler,
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versus

Hope Producing Company,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Petitioner, J. Henry Hemler, prays that a writ of certiorari issue to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above case, reported in 117 Federal Reporter (2d) page 231.

JURISDICTION

The jurisdiction of this Court is invoked under Judicial Code Section 240 (a); U. S. Code, Title 28 Sec. 347 (a). The judgment of the Court of Appeals was entered January 16, 1941. Petitioner applied for rehearing on February 6th, 1941, and rehearing was denied by that Court on March 8th, 1941.

QUESTIONS PRESENTED

1. May the Court of Appeals in this case decide two important questions of local law in a way in conflict with applicable decisions of the Supreme Court of Louisiana.

2. Does an appellate court depart from the accepted and usual course of judicial proceedings, and deny to an appellant due process of law, by completely failing to consider and decide the issues properly laid before that court as a basis for the appeal.

STATEMENT OF THE MATTER INVOLVED

Petitioner, a farmer, leased his farm for oil and natural gas development, under a customary and widely used lease, stipulating that lessee (respondent herein) pay to petitioner as royalty, one-eighth of the *market price* of all gas produced under the lease (Tr. 23). Under this lease, respondent drilled a well on petitioner's farm, from which much natural gas was produced (Tr. 59).

Respondent, Hope Producing Co., attempted to settle with petitioner for the royalty due him, by claiming that the market price of the natural gas so produced was 3c per thousand cubic feet (Tr. 48). Petitioner claimed that this market price was much higher, and sues in this lawsuit for the difference (Tr. 13). Hence the sole issue in this case is, how is the market price of natural gas under such leases to be determined.

The facts are almost entirely undisputed, the undisputed facts being:

Petitioner's farm and well are in and part of the Richland Gas Field, which is a definite area of land in

Louisiana, about 9 miles long and 6 miles wide, from which immense quantities of natural gas have been produced (Tr. 197).

The market in which was sold the natural gas produced in the Richland Gas Field, including petitioner's well, was as follows: all this natural gas, as it comes from the well, contains gasoline. This gasoline is first extracted in the field, and sold separately. The natural gas, with the gasoline extracted, is then sold to pipe lines which were built into the field, and which transport the natural gas from the field to distant places (including St. Louis, Atlanta and New Orleans), or a small quantity of the gas to nearby carbon black plants.

On the trial of this case in the District Court before a jury, petitioner, as plaintiff, offered in evidence all of the sales to the pipe lines, being all of the sales of natural gas made within the Richland Gas Field during the period of time involved in this suit, and claimed that the market price under leases like the lease sued on, is the fair average of these prices in these sales.

It is entirely undisputed that these sales are genuine, bona fide sales, of immense quantities of gas, being all the sales made in the field, and that the average price in these sales is between 3c and 4c per thousand cubic feet. Respondent, Hope Producing Co., admits that the average price it received for all of its immense sales of gas in the Richland Gas Field was 4.832c per thousand cubic feet (Tr. 72), altho claiming to petitioner that the market price was 3c.

Respondent, Hope Producing Co., as defendant in the District Court, claimed that these pipe line sales could not

be used to prove the market price of gas, because they were made under the following circumstances: Before these pipe lines were built into the Richland field, the pipe line companies, to justify their investment, made contracts with producers in that gas field, stipulating that these producers would deliver a continuous supply of gas to the pipe lines, over a period of years, usually ten years, at prices stipulated in advance for each year of the contract. The prices introduced in evidence by petitioner on the trial of this case, were the prices paid under these contracts in the years involved in this suit. Respondent, Hope Producing Co., contended in the District Court, and produced opinion evidence of gas company officials tending to prove, that the gas producers who sold gas to these pipe lines were put to some vague, indefinite, but strongly urged expense by reason of the fact that deliveries of the gas sold were made over a period of time instead of all at one time (Tr. 89-120). In the alternative, if these pipe line prices were used, respondent introduced the same opinion that while the amount of this expense could not be accurately ascertained, yet it would make up the difference between the 4.832c for which they sold their gas, and the 3c they paid petitioner (Tr. 68).

Next, respondent introduced and strongly urged to the jury, 865 oil and gas leases wherein various landowners in the county where the Richland Gas Field is located, but mostly outside the gas field, leased their land for oil and gas development under leases stipulating that the price they should receive as royalty, if gas was ever produced (there being no showing that any gas was ever produced under these leases), should be ⅛th of 3c per thousand cubic feet of gas produced, instead of "Market Price" as in the lease at bar in this suit. Petitioner contends that these were sales, not of gas, but of right to drill.

Next, respondent introduced in evidence, the opinions of various gas company officials that 3c was the correct market price (Tr. 85, 83).

Lastly, respondent claimed that under the lease contract sued on, the intent of the parties was that the market price should be for sales at the well where produced, and since there were no sales at the well involved in this suit, the market price should be the few, insignificant sales which were made in which pipe lines built direct to a well (not the well involved in this suit) and took the gas there, whereas almost all of the pipe line sales were made by delivery of the gas to the pipe line at central points within the field.

Petitioner objected to all of the evidence introduced by defendant as above recited, on the ground that it was irrelevant and immaterial, because the market price can be fixed only by evidence of the price received in genuine sales.

The District Court permitted all of the evidence of respondent to be admitted and read to the jury, and charged the jury that if they found any sufficient sales at any wells in the field, including the above stated leases as sales, they should disregard the big pipe line sales (Tr. 355, 356). Under this charge, the jury brought in verdict for respondent (Tr. 382).

The District Court also ruled as a matter of law that petitioner was not entitled to any royalty on the gasoline produced by respondent from the well on petitioner's land (Tr. 43), because the lease contract sued on (Tr. 22), contains no reference to the production of gasoline, and therefore does not allow lessor any royalty on gasoline.

Petitioner appealed to the Circuit Court of Appeals for the 5th Circuit from this judgment, urging as points on which he relied in the appeal (Tr. 386), all of the rulings of the District Court above stated.

The Court of Appeals rendered an opinion and decree reading in full as follows: 117 F. 2d. 231 (Tr. 401):

> "This is another appeal from a judgment on a verdict, fixing the market value of gas, in a suit for royalty arrearages on gas wells, in the Richland Gas Field. This time the verdict was against the plaintiff. Though there was a different plaintiff and defendant, and different counsel for defendant, this suit, as the others, was brought by the same counsel for plaintiff, involving the same issues, was tried before the same judge, in substantially the same way, and was submitted here on the same day with Union Producing Co. v. Pardue, and Union Producing Co. v. Driskell, this day decided.
>
> "Apparently the only substantial difference in the cases is that in the first two the defendants were appellants, and in this, the plaintiff is, and whereas the plaintiff in those cases was insisting that the jury verdict be upheld, the defendant in this case is so insisting."

Appellant recognizes this situation. In his brief he says:

> " 'Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time. In each of these cases, the same narrow issue was presented, namely, what is the market price of natural gas at the Richland Gas Field, in Rich-

land Parish, State of Louisiana.' In the other cases, the defendants were objecting to the introduction of contracts showing sales of gas in the field. In this, the plaintiff is objecting to the introduction of leases showing prices paid for gas at the well. In those, defendant objected to the erroneous admission of opinions in evidence, here plaintiff objects. Tried upon the same principles, and in the same way, as the others, it is quite obvious that if those judgments were correctly affirmed, this one must be, unless the trial is shown to have gotten out of bounds here to appellant's prejudice. We find no such instance. Indeed, if anything, this case was tried more faithfully by the rules we have laid down than the others were. To reverse the judgment in it, would be, for the reasons set out in the Pardue and Driskell cases, this day decided, to reverse court and counsel for pursuing the course we have laid down, follow the track we have marked out, in prior opinions. Appellant's counsel, seeing clearly that this is so, without pointing out any good reason why we should, urges us to retract what we have said about market value at the well, and, plumping with him for a new measure, market value in the field, reverse the judgment because proof was taken and the jury instructed as to market value at the well. We think it plain that what we and the Supreme Court of Louisiana have said on this subject has been correctly said and we have no disposition to withdraw or depart from our former opinions. Upon the claim for the gasoline royalties made in this case, we need say nothing except to refer to and adopt what we said on a similar claim made in Pardue's case. The judgment was right throughout. It is affirmed."

It is on this opinion of the Court of Appeals that we ask review by this petition for writ of certiorari.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

The issues in this case are of wide general importance, because they settle the method by which a landowner can compute his royalty, and the amount of the royalty, in all leases of land for oil and gas development in which the royalty is specified as "Market Price". Such leases are very common, being the only lease in which a landowner who thinks the market price of natural gas will advance in future years, can participate in that advance. If the decision of the Court of Appeals is allowed to stand, a landowner not expert in the gas business will be helpless in obtaining the royalty which is owed to him by the expert gas companies who are always the lessees in such cases.

2.

The decision of the Court of Appeals, denying to petitioner any royalty on the gasoline produced under the lease sued on, is in conflict with the decisions of the highest local court, the Supreme Court of Louisiana, as shown by the following decisions:

Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561.

Said decision also seems contrary to equity and the contract, by permitting respondent to take gasoline from petitioner's land and pay petitioner nothing for it.

3.

The decision of the Court of Appeals, denying that the market price contemplated by the parties, and the

market price to be used in this suit, is the market price in the field where produced, there being no sale at the well involved in this suit, is in conflict with the decision of the Supreme Court of Louisiana in the following cases:

Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
Sartor v. United Carbon Co., 183 La. 287, 163 So. 103.

4.

The Court of Appeals departed from the accepted and usual course of judicial proceedings, and denied to petitioner due process of law, by completely failing to consider or decide the issues laid before it by petitioner as appellant in that Court, as hereinabove recited.

The opinion of the Court of Appeals refers to its decision in the following cases decided the same day:

Union Producing Co. v. Pardue, 117 Fed. (2d) 225;
Union Producing Co. v. Driskell, 117 Fed. (2d) 229;

Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case.

The opinion of the Court of Appeals also refers to previous decision of that Court on the same subject matter. These decisions were:

Arkansas Nat. Gas Co. v. Sartor, 78 F. 2d, 929;
Sartor v. United Gas P. S. Co., 84 F. 2d 436, 438.

In those cases, the Court of Appeals did not discuss the issues here presented, except as to the one holding that a daily market price must be shown, and in the case at bar we introduced new evidence, not before the Court in any previous case, that there can be no such thing as a daily market price for natural gas, and no such price was contemplated by the parties, which new evidence the Court of Appeals ignored.

PRAYER

Wherefor petitioner respectfully prays that a writ of certiorari issue directing the United States Circuit Court of Appeals for the Fifth Circuit to certify and send to this Court for its review and determination, a full transcript of the record and proceedings in the suit entitled J. H. Hemler v. Hope Producing Co., No. 9504 on the docket of that Court; and that finally this case be remanded to the United States District Court for the Western District of Louisiana for new trial; prays for all necessary orders and for such other relief as the Court may deem proper.

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Attorney for Petitioner.